

**IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA**

GORDON L. JOYNER,

Plaintiff,

v.

STATE ACCOUNTING OFFICE OF THE
STATE OF GEORGIA,

Defendant.

CIVIL ACTION FILE NO:
2018CV313290

ORDER AND NOTICE

The above-captioned matter is before the Court on Plaintiff Gordon L. Joyner's ("Plaintiff") Motion to Disqualify, which was filed on February 27, 2019 and amended on June 11, 2019. The Court initially set this matter down for a hearing on May 13, 2019, but at the request of the parties, this matter was reset for July 11, 2019. As scheduled, the Court held a hearing on Defendant's Motion to Disqualify on July 11, 2019, and both sides appeared and were allowed an opportunity for oral argument. Now, having considered Plaintiff's Motion to Disqualify, the Response of Defendant State Accounting Office of the State of Georgia ("Defendant") in opposition thereto, the arguments presented, the entire record in this matter, and applicable Georgia law, the Court herein finds as follows:

In Plaintiff's Motion to Disqualify, Plaintiff seeks to disqualify the Attorney General of the State of Georgia (the "AG's Office") from serving as counsel for Defendant in this case.

In furtherance thereof, Plaintiff asserts that the AG's Office has an inherent conflict in defending a state agency and its officials in an Open Records Act case, while also possessing the authority to prosecute violations of the Open Records Act pursuant to O.C.G.A. §§ 50-18-73(a) and 50-18-74. Additionally, Plaintiff asserts that because several attorneys in the AG's Office provided legal advice to Defendant regarding the purported Open Records Act violations at issue

prior to the initiation of this litigation, these attorneys will be necessary witnesses in this case and, as a result, are conflicted from representing Defendant herein.

First addressing Plaintiff's assertion that the AG's Office cannot represent Defendant in this "enforcement of the Georgia Open Records Act matter," while also "carrying their corollary prosecutorial responsibilities and duties," the Court finds no merit to this claim.

Under the Georgia Constitution and governing Georgia law, the AG's Office has a constitutional and statutory obligation to represent and defend the agencies of the State of Georgia, including Defendant. *See* GA. CONST. ART. V, § III, PARA. IV; *see also* O.C.G.A. 45-15-34. Here, Plaintiff failed to point to any authority or to present any evidence to overcome this statutory and constitutional mandate obligating the AG's Office to represent Defendant in this action.

Furthermore, a trial court has discretion to determine whether an attorney should be disqualified, and "the right to counsel is an important interest which requires that any curtailment of the client's right to counsel of choice be approached with great caution." Blumenfeld v. Borenstein, 247 Ga. 406, 408 (1981). In this case, Plaintiff failed to demonstrate to this Court that the AG's Office should be disqualified as counsel for Defendant, and the Court will not grant such an extraordinary remedy absent the proper showing. Bernocchi v. Forucci, 279 Ga. 460 (2005).

Additionally, the Court does not find that the AG's Office's discretionary authority to bring an action to enforce the Open Records Act creates a conflict in representing/defending Defendant in this litigation. *See* O.C.G.A. § 50-18-73(a). Governing Georgia law explicitly provides that the AG's Office has no such conflict in exercising this discretionary prosecutorial authority and acting as legal advisor and counsel to state agencies. *See* Brown v. State, 177 Ga. App. 284, 292 (1985); *see also* GA. CONST. ART. V, § III, PARA. IV.

As such, Plaintiff's Motion to Disqualify on this basis should be denied.

Turning now to Plaintiff's argument that certain attorneys in the AG's Office will be

necessary witnesses in this case, and thus, the AG's Office is impermissibly conflicted from representing Defendant herein, the Court likewise finds no merit in this contention.

Pursuant to Rule 3.7 of the Georgia Rules of Professional Conduct, “[a] lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where: (1) the testimony relates to an uncontested issue; (2) the testimony relates to the nature and value of legal services rendered in the case; or (3) disqualification of the lawyer would work substantial hardship on the client.” Ga. R. Prof'l Conduct 3.7(a).

As the Georgia Court of Appeals held in Clough v. Richelo:

The purpose of Rule 3.7 is to prevent an attorney from being in the awkward position of acting as both a witness and an advocate at trial, which could create some of the following problems: the possibility that, in addressing the jury, the lawyer will appear to vouch for his own credibility; the unfair and difficult situation which arises when an opposing counsel has to cross-examine a lawyer-adversary and seek to impeach his credibility; and the appearance of impropriety created, *i.e.*, the likely implication that the testifying lawyer may well be distorting the truth for the sake of his client. Further, there is great potential for juror confusion about which role the lawyer is serving during trial. A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear to the factfinder whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof.

Clough v. Richelo, 274 Ga. App. 129, 137 (2005) (citing Rule 3.7).

In this case, the Court finds that Plaintiff failed to demonstrate that the attorneys in question are likely to be necessary witnesses in this litigation. Based upon the nature of the claims and defenses in this action, the Court finds that the evidence at issue is available from witnesses other than attorneys from the AG's Office. Moreover, even if certain of these attorneys knew information relevant to the issues in this case, these attorneys will not serve as advocates at trial and/or the information they know would likely be protected from disclosure by the attorney-client privilege.

Accordingly, for the reasons set forth above, IT IS HEREBY ORDERED AND

ADJUDGED that Plaintiff's Motion to Disqualify is **DENIED**.

Finally, turning to Plaintiff's underlying claims giving rise to this litigation – namely, that Defendant failed to respond to Plaintiff's Open Records Act requests pursuant to O.C.G.A. § 50-18-71, the Court finds that based upon the record, Defendant has now fully complied with Plaintiff's request and produced all documents responsive thereto. However, the Court will hold an evidentiary hearing in this case to address Defendant's failure to timely respond to Plaintiff's Open Records Act request in 2017, as well as Plaintiff's potential entitlement to reasonable attorney's fees and litigation expenses pursuant to O.C.G.A. § 50-18-73(b).

In furtherance thereof, the Court hereby issues the following briefing schedule and hearing notice:

1. This matter will come before The Honorable Shawn Ellen LaGrua for a final evidentiary hearing on **Thursday, October 17, 2019 at 10:15 a.m.** in Courtroom 8D, Justice Center Tower, 185 Central Avenue, Atlanta, GA 30303.
2. Parties wishing to file a brief in support of their positions may do so no later than **Friday, September 6, 2019.**
3. Responses, if any, shall be filed with the Court no later than **Monday, October 7, 2019.**
4. A courtesy copy of any such brief and/or response shall be submitted directly to the Chambers of Judge LaGrua. The original shall be e-filed with the Office of the Clerk of the Superior Court of Fulton County.
5. **Please note that our Court does not provide a Court Reporter for take downs in civil cases, so if the parties would like the hearing reported, the parties will need to provide their own Court Reporter.**
6. No continuances will be granted unless good cause is shown. Any legal conflicts are to be reported to Libby Baum, Staff Attorney to Judge LaGrua, at least **seven** days before the hearing in a conflict letter compliant with Uniform Superior Court Rule 17.1. Any inquiries regarding this hearing should also be directed to Libby Baum, who may be

contacted at [REDACTED] or [REDACTED]

SO ORDERED this the 24th day of July, 2019.



SHAWN ELLEN LaGRUA, Judge
Fulton County Superior Court
Atlanta Judicial Circuit

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